SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

MARY MOTON, Plaintiff, v. BRUCE M. LOEFFLER; DANIEL M. O'BRIEN; and DOES 1-5, INCLUSIVE, Defendants.	Case No.: CV 07-0850 STATEMENT OF DECISION

This controversy between plaintiff Mary Moton, and defendants Bruce Loeffler and Daniel O'Brien, involves a boundary dispute over foliage located between their homes. The Court has considered the testimony and exhibits, the briefs and arguments of counsel, and the various responses to the Proposed Statement of Decision. This Statement of Decision will address each legal claim, seriatim, by stating the grounds upon which the decision rests.[1]

As to the spite fence claim, Civil Code § 841.4 requires plaintiff to prove that the fence was "maliciously erected or maintained for the purpose of annoying the owner

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1 A statement of decision need do no more than this. *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 499-500 (citations omitted); *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125 (citations omitted). The document need not respond point by point to issues posed in a request for a statement of decision. *Id.* Nor must it address all the legal and factual issues raised by the parties. Rather, a statement of decision must fairly disclose the court's determination as to the ultimate facts and material issues in the case, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. *Id*.

of an adjoining property." The Court is not persuaded by the evidence that the primary or dominant purpose of the fence was to annoy Ms. Moton; [2] rather, it was to establish a "cloistered sanctuary" according to the defendants' tropical aesthetic tastes. An additional purpose was to provide a visual screen from Broad Street, from the second story of Ms. Moton's house, and from the nearby power lines. The Court finds for the defendants on the spite fence claim.

With respect to the trespass claim, the Court concludes that the elements of trespass, as set forth in CACI instruction 2000 and *San Diego Gas and Electric*, 13 Cal.4th 893, 936-937, have not been proven. The plaintiff has not proved "actual harm" as that term is specifically defined under trespass law.

With respect to the nuisance claim, the Court concludes that the elements of private nuisance, as set forth in CACI instruction 2021 and *San Diego Gas and Electric*, 13 Cal.4th 893, 936-937, have been proven. Under the totality of the circumstances, there is ongoing interference with plaintiff's reasonable use and enjoyment of her property. By planting the bamboo (in particular "running" bamboo, but also "clumping" bamboo) at the property boundary, defendants created a condition that is and has been an obstruction to Ms. Moton's free use of her property. Their conduct has substantially interfered with Ms. Moton's comfortable enjoyment of her property, and it continues to do so today.

Even discounting Ms. Moton's idiosyncrasies, the Court concludes that a reasonable person would find the presence of the bamboo, the height of the bamboo, and the overall nature and residue of the bamboo, to constitute a nuisance because there has been substantial harm to the plaintiff as the result of defendants' negligent acts. [3]

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2 Ms. Moton is very particular about what she expects to occur on her property and its borders. Her first interactions with Mr. Loeffler, and her use of a chain saw on a tree that borders both properties, were unlikely to promote good neighbor relations. Her perceptions are often exaggerated. Although she was apparently scared and threatened by the defendants' actions, a reasonable person would not have been so emotionally impacted.

3 Defendants decided early on to develop a landscaping without regard to the impacts of their plans on Ms. Moton. While justifiably irritated by Ms. Moton's self-help use of a chain saw, they should at least have consulted with her about their landscaping plans before installing bamboo on the shared boundary. As discussed, bamboo is a notoriously problematic and invasive grass.

Substantial harm is being caused, collectively, by: a) bamboo husks and leaves; b) the size and scale of the bamboo plants; d) the dense screening and light blockage that has occurred; e) the substantial, periodic intrusions onto plaintiff's property, particularly during periods of high wind; f) the necessary and substantial ongoing maintenance requirements, which are far from perfect; and, g) the impact on Ms. Moton's preexisting garden.

The Court is persuaded by Ms. Leach's testimony that there is a profound shade effect, which creates a gloomy and claustrophobic feeling on Ms. Moton's property. The bamboo grass is too tall, and the scale is too massive, in proportion to the height of the adjoining properties and the scale of the neighborhood. This finding applies not only to the past appearances of the boundary area, but also includes up to the time of trial.[4]

The videotape footage taken by Sean Moton, Exhibit 142, is compelling evidence with respect to the size, scale and impacts of the bamboo on Ms. Moton's property. High winds, which routinely occur in this area of the City of San Luis Obispo, regularly blow considerable amounts of husks, leaves, and other bamboo debris onto Ms. Moton's property.

Given its nature, size and location, the bamboo also constitutes a fence and hedge under the City of San Luis Obispo fence and hedge ordinance, Zoning Regulation 17.16.050. Defendants readily concede that the point of the bamboo is, first and foremost, privacy. Although the bamboo cannot be considered a solid wall at the present moment (i.e. at the time of the site visit), certainly the intent and design of the bamboo plantings is to block the view of the second story of Ms. Moton's house, as well as the power lines and Broad Street.

Moreover, referring to Ms. Leach's testimony, the bamboo at most times exists as a solid wall of green, thick and lush bamboo. Further, the maximum height of a fence or hedge under the City ordinance is six feet tall, with a “shrinking height” as it

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4 While not attributing any ill motive to the defendants’ thinning and trimming activities, the Court notes that the appearance of the bamboo at the time of the site visit was very different from the way it appeared in the years and months beforehand.

approaches the street. Mr. Riese's testimony, as illustrated by Exhibit 108, shows that the bamboo is located too close to the street, and that it blocks the view of approaching cars and pedestrians from Ms. Moton's driveway. Exhibits 133 and 134 demonstrate the public safety problems that have been created by the defendants' plantings.

Given the totality of the circumstances, the bamboo has afforded defendants their privacy, but in the process it has created a private nuisance with respect to their adjoining landowner.

As to injunctive relief, the Court is required to balance the harms in determining what sort of injunctive relief, if any to grant. In the Court's view, the plum, palm and mulberry trees currently cause only *de minimis* encroachments. Further, plaintiff has not carried her burden of showing any harm caused by the mulberry roots. [5]

On the other hand, the bamboo grass must either come out entirely, or be trimmed down to levels that approximate the requirements of City Zoning Regulations 17.16.050 and 17.16.020 (i.e., approximately 6 feet, diminishing to approximately 3 feet at the driveway property line). Cutting the bamboo down to these heights will ensure the public safety, minimize the intrusions that do occur into plaintiff's property, diminish the size and scale to appropriate levels that are envisioned by the ordinance, increase the overall light into the plaintiff's yard, and restore a reasonable amount of light to the plaintiff's garden. Thinning the bamboo and taking out the tall bamboo culms is simply not enough to eliminate the nuisance, especially in light of the past history of maintenance and the evidence of ongoing encroachments.

This is an unfortunate case. Had the parties put their minds to it, the Court is convinced that they could have come up with a reasonable, compromise solution. Instead, a lack of cooperation and problem solving, coupled with some poor choices, has led to an expensive and time-consuming legal controversy that is still not finished. [6]

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5 In the future, if these trees substantially encroach onto plaintiff's property, Ms. Moton may have a remedy of self-help. Given the current tree locations, however, the Court is by no means encouraging self-help or suggesting that it would be appropriate at this point in time.

6 It is regrettable that, early in the relationship, Ms. Moton objected to the six-foot fence proposal made by defendants, which is essentially the relief being ordered by the Court.

Indeed, the Court is troubled by the length of time, the amount of money, and the overall commitment of resources that have been devoted to this case to date.[7]

Although the trial was handled efficiently and cooperatively, there are far better ways in the civil justice system to resolve a case like this one at less expense and within a reasonable time. The Small Claims Court system could have finally adjudicated this case within a matter of months, not years, while providing the same injunctive remedies that are now being granted.

In any event, the Judgment will direct that the bamboo grass either be removed entirely, or that it be trimmed down to the levels described in City Zoning Regulations 17.16.050 and 17.16.020. The six-foot height restriction will be measured from the base of the wooden fence paralleling the property boundary. Public safety and mitigation of the nuisance can be reasonably achieved by reasonable compliance with the zoning regulations.

The Court encourages the parties to reach agreement on the form of the Judgment, and to submit it for signature as soon as possible without the necessity of a further hearing. If agreement cannot be reached, on or before July 9, 2010, counsel for plaintiff shall file and serve the proposed Judgment. Any objections (as to form only, and consisting of no more than two pages) shall be filed and served on or before July 16, 2010. Any remaining disagreements will be considered at a hearing on July 22, 2010. No further argument on the merits will be entertained.

It is so ORDERED.

DATED: June 28, 2010

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CHARLES S. CRANDALL
Judge of the Superior Court

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7 The case was filed September 27, 2007, and a cross-complaint was filed shortly thereafter. Following numerous fact and expert depositions over a period of years, the trial took five days to complete and involved eight witnesses. The appeal as of right may prolong the duration of this dispute for an additional period of years.